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IN THE

Supreme Court of the United States

OCTOBER TERM 1962.

No. 879

SHIP-BY-TRUCK CO., INC., d/b/a

GRAHAM SHIP-BY-TRUCK COMPANY et al.,
Appellants,

vs.

UNITED STATES OF AMERICA et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

MOTION TO AFFIRM

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INDEX

Statement 1
Argument 5
Conclusion 9
Certificate of Service 9

Cases Cited

Alco Moving & Storage Co., Inc.—Purchase—Dierking, 47 M.C.C. 557, 569 6
County of Marin v. *United States*, 356 U.S. 412, 416 (1958) 6
Federal Trade Commission v. *Standard Oil Co.*, 355 U.S. 396, 401 8
McLean Trucking Co. v. *United States*, 321 U.S. 67, 87-88 9
Schaffer Transportation Co. v. *United States*, 355 U.S. 83, 92 9
Stearn v. *United States*, 87 F. Supp. 596, 601 8
St. Joe Paper Co. v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 6
United States v. *Pierce Auto Freight Lines*, 327 U.S. 515, 532 8
United States v. *Resler*, 313 U.S. 57, 60 (1941) 7
Universal Camera Corp. v. *Labor Board*, 340 U.S. 474, 491 8

Regulations and Statutes

49 C.F.R. 179 2
Commission Rule 1.101(e) 3
Section 5(2)(a), 49 U.S.C.A. 5, 6, 8
Section 5(10), 49 U.S.C.A. 4, 6
Section 212(b), 49 U.S.C.A. 312(b) 2, 3, 4, 5, 6, 7, 8

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by

appellants to set aside orders of the Interstate Commerce Commission. These orders, originating in separate proceedings instituted at different times, granted approval under the transfer rules[1] prescribed pursuant to Section 212(b) of the Interstate Commerce Act,[2] of a proposed sale and transfer by S. & C. Transport Co., Inc., to Stevens Express, Inc., of a portion of the former's operating rights, and by Spencer Bros., Inc., to Stevens Express, Inc., of all of Spencer's operating rights.

The Facts concerning these transactions are not in dispute and occurred in the following chronological order:

On July 11, 1960, Stevens Express, Inc. (Stevens), a newly formed non-carrier corporation, and S. & C. Transport Company, Inc. (S. & C.), a motor common carrier, filed a joint application with the Commission seeking authority under Section 212(b) of the Act for Stevens to purchase a portion of the operating rights of S. & C.[3] The application was assigned Docket No. MC-FC-63432.

On September 30, 1960, the Transfer Board of the Commission denied the application because the rights to be sold were not clearly severable from the rights to be retained in that both the transferor, over irregular routes, and the transferee, over regular routes, both would be able to serve some points in Kansas.

On October 13, 1960, the applicants jointly petitioned for reconsideration agreeing to cancellation of all of transferor's duplicating rights upon approval of the sale.

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1. The rules and regulations are set forth in 49 C.F.R. 179.

2. Section 212(b), 49 U.S.C.A. 312(b), provides:

"Except as provided in Section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

3. Consisting of all regular route authority which constituted only a small part of the operating rights owned by S. & C.

On October 12, 1960, non-carrier Stevens, and Spencer Bros., Inc. (Spencer), a motor carrier owning two units of highway equipment, filed a joint application seeking authority under Section 212(b) of the Act, for Stevens to purchase all of Spencer's operating rights. This application was assigned Docket No. MC-FC-63698.

On December 7, 1960 Division 4 of the Commission, acting as an Appellate Division, granted the petition for reconsideration in the S. & C. proceeding and approved the transfer under Section 212(b) subject to a condition, revoking the portion of the irregular route operating rights of S. & C. which duplicated the regular route authority to be transferred to Stevens.

On February 1, 1961, the Commission was notified that the Stevens-S. & C. transaction had been consummated which elevated Stevens to the status of a carrier subject to the provisions of the Interstate Commerce Act. After complying with all applicable Commission regulations Stevens began operations with two vehicles purchased from a source other than the transferor.

On February 24, 1961, the Transfer Board approved the sale and transfer of the operating rights of Spencer, a carrier owning and operating two vehicles, to Stevens, now also a carrier owning and operating two vehicles. The transaction was approved under Section 212(b) as one involving the sale and purchase of operating rights between two carriers owning less than twenty vehicles.

Thereafter, appellants and others filed several petitions[4] and motions on various dates requesting reconsideration and to set aside the orders in Docket Nos. MC-FC-63432

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4. The petitions in the S. & C. matter were filed beyond the time permitted by Commission Rule 1.101(e). Waiver was sought.

and MC-FC-63698 on the jurisdictional grounds that both applications must be considered together under Section 5 of the Act because a non-carrier, Stevens, is attempting to purchase the operating rights of two motor carriers and the total number of vehicles involved exceeds twenty.[5]

On May 23, 1961, Division 3, acting as an Appellate Division, issued two separate orders (J.S. App. A11-13, A 14-16), one in each case, accepting the late filed petitions and motions for filing and denying the same on the grounds that they "* * * set forth no facts or arguments which were not previously considered or which would establish that the transfer was subject to Section 5, or that it should have been consolidated with No. MC-FC-63698, or that the transfer was not properly approved under the [transfer] rules, * * *". (J.S. App. A12).

On appeal, the district court concluded (J.S. App. A9-10), that the S. & C. transaction involved a transfer from a carrier to a non-carrier and was not subject to Section 5; that the later Spencer transaction involved a transfer between 2 carriers owning less than twenty vehicles and was exempt from Section 5 by the provisions of Sections 5(10); and, that the Commission acted within its authority in permitting the transfers of operating rights from S. & C. and Spencer to Stevens in separate transactions under Section 212(b) of the Act.

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5. Counting all the vehicles owned and operated by S. & C. and Spencer.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. Appellants seek essentially to disregard the limited factual situation in challenging the legality of the Commission's wisdom of approving the unrelated and non-dependent applications by small carriers to transfer their operating rights in separate transactions under Section 212(b) of the Act. Each branch of the attack has been thoroughly considered and properly rejected by the Court below, and there is no need for further review.

1. Contending that the two transactions should have been regarded as one involving the acquisition by a non-carrier of control of two or more carriers within Section 5(2)[6], appellants initially allege (J.S. 11, 12) that the district court erred in sustaining the Commission's application of the rule that the status of the parties as of the date of actual consummation of the transaction is controlling in

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6. Section 5(2)(a) provides:

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties or any part thereof, of another; or for any carrier or two or more carriers jointly to acquire control of another through ownership of its stock, or otherwise; *or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise;* or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise: * * *" (Emphasis supplied).

determining whether the provisions of Section 5(2) are applicable. Appellants argue (J.S. 13) that the Commission automatically acquired jurisdiction of both transactions under Section 5(2) upon the subsequent filing of the unrelated and non-dependent Spencer application because both applications were concurrently pending for some months before Stevens became a carrier upon approval and consummation of its purchase of the S. & C. rights.

These arguments lack merit. The Congressional purpose in enacting Section 5 was to facilitate mergers and consolidations in the national transportation system. Section 5(2)(a) is principally concerned with the bringing of two or more carriers under control or management in a common interest. *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958); *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298.

For small motor carriers desiring to effect the transfer of a certificate or permit, or desiring to merge or consolidate where the total number of vehicles owned does not exceed 20, a specific exemption is provided in Section 5(10).[7] The intent of Congress obviously was to provide a means whereby such transfers or mergers by small carriers could be effected easily under rules and regulations prescribed under Section 212(b),[8] and without the delays and

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7. Section 5(10) provides:

"Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) of this section where the only parties to the transaction are motor carriers * * * and where the aggregate number of motor vehicles owned, leased, controlled or operated by such parties, for the purposes of transportation * * * does not exceed twenty."

8. The rules were prescribed to enable the Commission to ascertain the identity of the transferees, actual as well as nominal, for the purpose of determining their fitness, willingness and ability to render operations in interstate commerce. *Alco Moving & Storage Co., Inc.—Purchase—Dierking*, 47 M.C.C. 557, 569.

procedure required for more substantial transactions under Section 5. *United States* v. *Resler*, 313 U.S. 57, 60 (1941).

The mere fact that two separate and unrelated applications for a non-carrier to acquire the operating rights of two carriers were concurrently pending for a short period of time is not controlling on the question of whether or not Section 5 applies unless the transactions were related and the survival of either depended upon the approval of both.[9] The Commission found that there was no reasonable justification, in terms of the public interest or otherwise, to warrant consolidation of both applications for consideration as a single transaction under Section 5 (J.S. App. B, p. A12). In terms of the statutory policy behind Section 5, the inconsequentiality of the transactions here in question is reflected in the fact these small carriers required a total of only four vehicles to operate all the rights involved.

On the basis of its own review of the administrative record in the light of the statutory language and the Congressional purpose, the Court below concluded (J.S. App. A6, 9-10) that the Commission properly rejected the claim of interdependency between the two unrelated transactions; applied the proper standard and acted within its authority in permitting the separate sales and transfers to Stevens under Section 212(b). There is no occasion for a second re-examination by this Court of that record. See

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9. The district court sustained the Commission's rejection of appellant's claim of interdependency of the two transactions finding that the transferors knew nothing about the other's proposed sale to Stevens; were not connected or affiliated with each other or with Stevens in any manner; and that the separately executed and independent contracts were not related to or dependent upon approval of the proposed transfer in the other (J.S. App. A9-10).

Federal Trade Commission v. *Standard Oil Co.*, 355 U.S. 396, 401; *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491.

2. Appellants argue (J.S. 14), that the Commission erroneously placed the burden of establishing jurisdiction under Section 5 upon them. But there is no foundation in fact for this charge.

There is nothing in the orders of the Commission, or the opinion of the court below, which even remotely indicates that the Commission required appellants to carry the burden of establishing jurisdiction under Section 5(2). Rejection of appellants' effort to show a scheme or interdependency between the two transactions does not amount to a requirement that appellants must establish jurisdiction.

3. Appellants further complain (J.S. 15-16), that the Commission's separate approval of the two transactions under Section 212(b) ultimately results in the combining of operating rights of two carriers into a new service in direct competition with their existing services without a finding, as required by Section 5(2), that such a result will be consistent with the public interest. This charge has no foundation.

It was the Congressional intent that operating rights under Section 212(b) might be freely transferred so long as the public interest was not harmed thereby. *Stearn* v. *United States*, 87 F. Supp. 596, 601. Certainly, the Commission had the competitive consequences in mind, *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 532. Its approval indicates that the public interest would not be harmed. When, as the district court found (J.S. App. A10), the Commission's conclusions are rational under the par-

ticular factual situation, appellants may not complain that they would prefer the matter to be decided more to their own advantage. *McLean Trucking Co. v. United States*, 321 U.S. 67, 87-88; *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 92.

CONCLUSION

Since this appeal presents no substantial question warranting plenary consideration, the judgment of the Court below should be affirmed.

Respectfully submitted this 12th day of April, 1963.

JAMES F. MILLER,
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Shawnee Mission, Kansas,
Attorney for Intervening Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the day and date last shown above, a copy of the foregoing document was served upon all parties of record in this proceeding by mailing to each of them a copy thereof, first class mail, properly addressed with sufficient postage affixed.

J. F. MILLER,
7501 Mission Road,
Shawnee Mission, Kansas,
Attorney for Intervening Defendants.

Date Due: April 15, 1963.